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No. A-78

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EDWARD LEROY LECK, *Petitioner*

v.

KENNETH PUGH and
CLEBURNE NATIONAL BANK, *Respondents*

Brief of Respondent, Kenneth Pugh, in Opposition to Petition for Writ of Certiorari to the Texas Supreme Court

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STATEMENT OF QUESTION PRESENTED

I.

Has Petitioner been deprived of his right to due process of law or denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Judgments of the State Courts with respect to "No Duty" to Petitioner by Respondent, Cleburne National Bank, and the bar to recovery by Petitioner by the doctrine of *res judicata*?

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Brief of Respondent, Kenneth Pugh, in Opposition to Petition for Writ of Certiorari to the Texas Supreme Court

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Kenneth Pugh prays that the writ of certiorari to the Texas Supreme Court be denied.

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas is reported as *Pugh v. Leck*, 604 S.W.2d 283 (Tex. Civ. App. — Waco, 1980, writ ref'd, n.r.e.). The prior opinion of the Texas Court of Civil Appeals for the Tenth Supreme Judicial District of Texas is reported as *Cleburne National Bank v. Kenedco, Inc.*, 547 S.W.2d 67 (Tex. Civ. App. — Waco,

1977, writ ref'd, n.r.e.). In both instances, the denial of writ of error by the Supreme Court of Texas was not reported. The opinions of the Court of Civil appeals and the denials of the writs of error by the Supreme Court of Texas are correctly reproduced as appendices to the Petition and will not be duplicated herein.

STATEMENT OF THE CASE

Respondent, Kenneth Pugh, deems it necessary to correct certain inaccuracies and omissions in Petitioner's Statement, and offers this statement of the case.

Leck and Pugh are equal shareholders in Kenedco, Inc., a Texas corporation. Leck operated the muffler shop division known as Cleburne Muffler Shop and the other division was known as Ken-Lee Marine Sales, which Pugh operated. Cleburne National Bank, upon the request of both shareholders, financed the corporation's operations in the marine business and took as collateral the inventory. Basically, the bank was engaged in a floor plan operation with Pugh and Leck. Leck and Pugh guaranteed all of the indebtedness in writing, and the indebtedness was also secured by a deed of trust on certain real estate.

In the prior litigation (547 S.W.2d 67), the bank sued Leck, Pugh, and Kenedco on the indebtedness and for foreclosure. Leck and Kenedco, ostensibly through Leck's attorneys, counter-claimed contending the bank had failed to preserve the collateral, had impaired the collateral, and concealed the facts concerning the financial condition of the operation, as well as a shortage of inventory, while Pugh basically admitted the liability to

the bank. The jury found no damage to Leck's personal estate and Leck did not appeal from the judgment.[1]

The cause went to trial for the second time on plaintiff's third amended original petition in Cause No. 124-75, and on defendant and counter-plaintiff, Kenneth Pugh's, first amended original petition in Cause No. 249-285-78, which was an action requesting, among other things, a receivership for the corporation known as Kenedco, Inc. as a result of Leck's misuse of corporate funds.

Following a lengthy trial, the jury rendered a verdict on special issues and relief thought to be in favor of Leck. From the adverse judgment on such special issues, Pugh and Cleburne National Bank appealed.

The Court of Civil Appeals held that the bank had no duty to Leck with respect to the administration of the floor plan. Also, the Court held that the judgment in the prior case (547 S.W.2d 67) barred any recovery for damages to Leck's personal estate because of the prior negative finding from which Leck took no appeal. *Pugh v. Leck*, 604 S.W.2d 283 (Tex. Civ. App.—Waco, 1980, writ ref'd, n.r.e.). This holding was based on the doctrine of *res judicata*.

SUMMARY OF THE ARGUMENT

Petitioner has not been denied due process or equal protection by the proceeding in State Court. The no duty

[1]The jury did answer one special issue in the sum of $100,000 damage which was found to be a defensive issue upon which no judgment for recovery would lie. *See* 547 S.W.2d 67, 69.

holding (applicable only to Respondent, the Cleburne National Bank) is the proper interpretation of the contractual relations of the parties under the floor plan agreement. No Court decision has developed a protected class or has given preferential treatment under the law based on a suspect classification.

The holding that subsequent recovery to Leck for damage to his personal estate is barred by the doctrine of *res judicata* denies no one due process. The same issue was fully tried in both trials and Petitioner failed to appeal the first adverse finding.

ARGUMENT

The Petitioner, since the first trial, has adamantly claimed Cleburne National Bank, the lender, owed a duty to Kenedco, Inc., the borrower, and Leck, a shareholder of the said Kenedco, Inc., to account to the borrower for the collateral. This contention is a reversal of the duties and rights of the parties.

The lender had a *right* to receive an accounting and the debtor had a *duty* to provide an accounting to the lender. Nowhere did the financing contract create a duty on the lender to account for inventory, nor did the contract create a corresponding right to receive the accounting in the debtor or its shareholders. No suspect classification is created; rather Leck has simply no right to recover because there was no duty to be breached. No class is created, therefore, we do not need to examine any of the principles related to equal protection, such as weighing a compelling state interest with individual rights.

As to Respondent, Kenneth Pugh, Petitioner claims that he has been barred by the invocation of the doctrine of *res judicata* from having his "day in court." This assertion is not true. Petitioner has had not one, but two, days in Court. Petitioner has twice vexed Respondent with the same claims.

This Court has held that the doctrine of *res judicata* is:

> A rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, whenever the judgment is entitled to respect.
>
> *Hart Steel Company v. Railroad Supply Company*, 244 U.S. 294 (1917)

The Texas Courts properly applied the doctrine of *res judicata* as stated in the Texas authorities. The Court of Civil Appeals, in applying *res judicata*, relied upon its decision in *Mitchell v. Carter*, 545 S.W.2d 869 (Tex. Civ. App. — Waco, 1977, no writ hist.) which relied on the Texas Supreme Court decisions in *Ogletree v. Crates*, 363 S.W.2d 431 (Tex., 1963); *Davis v. First National Bank of Waco*, 139 Tex. 36, 161 S.W.2d 467 (1942).

In the first trial, the jury verdict contained a finding that Leck recover nothing for damages to his personal estate. Leck did not appeal this adverse finding. Thereafter, Leck, in the second trial, attempted to recover

judgment against the same parties for alleged damages arising from the same alleged wrongful act.[2] The Court of Civil Appeals held that the adverse finding that Leck take nothing, which was a final judgment, barred any recovery in the second case. Thus, the alleged damages to his corporate stock *have* been litigated on two occasions.

The damages which Leck alleges occurred after the first trial were not connected to the acts of Respondents, but were in fact an attempt to recover expenses of the corporation as personal damages in addition to damages to the personal estate which the first judgment, based on a jury verdict, held that Leck take nothing.

This case is an attempt to relitigate the same issue because the Petitioner lost the first attempt. Nothing more, nothing less. Leck's remedy, if any he had, was to appeal the adverse finding in the first case. He failed to properly dispose of the matter or appeal same and, having lost on another point on appeal, has attempted to relitigate. This Court has invoked the doctrine of *res judicata* in a strikingly similar case, *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and should apply the same doctrine here. This Court should deny this petition. It is without merit.

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[2]In fact, Leck's trial pleading in the second trial contained the following allegation admitting the prior trial finding:

"Alternatively, LECK alleges that all fact issues have been determined by the jury verdict on December 16, 1974, in cause number 873-73. That only the amounts of damage to Plaintiff, both actual, exemplary, and attorney fees remain in issue for determination of this cause."

CONCLUSION

There was no denial of due process or equal protection in the State Courts, and this petition presents no constitutional issue. It is without merit. Wherefore, Respondent, Kenneth Pugh, prays that this petition be in all things denied.

Respectfully submitted,

ROBERT A. SPARKS,
Attorney at law, P.C.

By _____
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October 23, 1981

CERTIFICATE OF SERVICE

I, Robert A. Sparks, attorney for Respondent herein, Kenneth Pugh, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on October _____, 1981, I served a copy of the foregoing Petition for a Writ Certiorari on Petitioner herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid to Robert J. Wilson, P.O. Drawer 325, Burleson, Texas 76031, Earl Rutledge, 1300 Oil & Gas Building, Fort Worth, Texas 76102, and upon the counsel for the remaining Respondents David B. Anderson, P.O. Box 486, Cleburne, Texas 76031, and Sloan B. Blair, 1800 First National Bank Building, Fort Worth, Texas 76102.

ROBERT A. SPARKS,
Attorney at Law, P.C.

By _____
ROBERT A. SPARKS